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No. 86-749

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY,
Petitioner,
v.
ALABAMA STATE BOARD OF EDUCATION; and
WAYNE TEAGUE, STATE SUPERINTENDENT
OF EDUCATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF IN SUPPORT OF CERTIORARI

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This suit was filed to dismantle the vestiges of segregation in Alabama's system of higher education. One of the principal vestiges is the manner in which the State maintains two largely segregated, predominantly black universities without providing them with the facilities, programs, and other resources necessary to enable them to attract the best students and to provide the highest quality education they can to those students—approximately half of Alabama's black college students—who attend.

Petitioner Board of Trustees of Alabama State University has for years been in the frustrating position of trying to do the best it can for its students while know-

ing that those students are being short-changed by the State and that Alabama State University is, however unwillingly, being forced by the State to participate in this shortchanging of its students.

When this lawsuit was filed, listing as defendants not only the State and numerous state officials but also all of the State's four-year colleges and universities, petitioner promptly moved for realignment as a plaintiff in order to seek, rather than resist, desegregation. Now, however, petitioner has been told that it may not do so because it is constitutionally inseparable from the State of Alabama. In fact, two of the respondents pressing that view in this Court are two *other* state universities —Auburn University and the University of Alabama— who believe they are free to proceed separately in *support* of the State, while Alabama State University (and, presumably, Alabama A & M University) are not free to proceed separately to *oppose* the State.

Ironically, none of the respondents is willing to defend the broad sweep of the appellate court's decision that petitioner is not qualified to advance the claims involved in this case. Rather, each respondent appears to acknowledge that a creature of the state is entitled to assert claims against its creator in furtherance of its own obligations under the Supremacy Clause and in pursuit of the constitutional interests of its students.[1]

Respondents argue instead that petitioner did not assert its claims in these terms, but rather did so solely in terms of its own "institutional" interests. Apart from the tenuousness of any such distinction, it is simply not true. Throughout this litigation, petitioner has made it clear that it was pursuing its Supremacy Clause obligations and representing the interests of its students and

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[1] *See* Briefs in Opposition to Certiorari filed by Auburn University at 12-13; University of Alabama at 10-11; United States at 7-8.

faculty. Its "institutional" interest thus lies in being able to provide a quality, desegregated education, as it is constitutionally obligated to do.

Thus, in the District Court, for example, petitioner's motion for a temporary restraining order, which initiated the proceedings involved here,[2] was accompanied by a complaint which alleged that the State Board's actions sought to be enjoined "have both the purpose and effect of discriminating against black students, black professionals and traditionally black Alabama State University." Complaint ¶ 7.

Similarly, on appeal, petitioner relied on the same standing cases as cited in its Petition for Certiorari and said:

> The reasoning behind these cases is that the school authority, under the combined effect of the Supremacy Clause and the Fourteenth Amendment, has the right to bring suit against the state to compel the state's obedience to the federal constitutional command that it take affirmative steps to eradicate the effects of *de jure* segregation.

Brief of Appellee Board of Trustees for Alabama State University, No. 85-7582 (11th Cir.) at 23.[3]

Finally, petitioner concluded its brief on the appeal in the following manner:

> No school is pleased when its graduates are unsuccessful, even when the level of success has its roots in discrimination and when it is measured by an invalid test. Alabama State University is no exception, and that is why it is in this lawsuit, as a realigned plaintiff, seeking a remedy on behalf of itself and its present and future students and faculty,

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[3] Copies of this brief, as well as the brief filed by petitioner in the Eleventh Circuit in the pending appeal on the merits, No. 86-7090, have been lodged with the Clerk of this Court.

[2] This motion has been reproduced in the Brief of the United States in Opposition at 4a-5a.

> that will disestablish the State's historic dual system of segregated education and that will enable Alabama State [University] to provide the highest quality education for all.

Id. at 46.

It must be remembered that the foregoing debate concerns the question of petitioner's standing or capacity to assert claims under the Constitution and under the Civil Rights Act of 1964; ultimately, these are major questions of justiciability under Article III. Moreover, they arise in the sensitive area of public education, where the ability of a school or school board to bring suit has frequently been essential to the preservation of fundamental rights. *E.g., Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Brewer v. Hoxie School District No. 4*, 238 F.2d 91 (8th Cir. 1956); *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). The number of recent school desegregation cases (many of them cited in the Petition for Certiorari) in which school districts and school boards have been plaintiffs shows the continuing importance of this role. Based on the appellate court's decision, school boards could no longer challenge state segregation in this way, but would instead have to remain as defendants even where they wish to remedy, rather than defend, such unconstitutional conduct. Such a drastic alteration in the law of standing should not take place in the absence of review by this Court.

In these circumstances, the ordinary rule against unnecessarily deciding questions of justiciability applies with unusual force. Respondent University of Alabama points out that "this Court has long held that under the 'case' and 'controversy' limitation of Article III of the United States Constitution, it should not decide issues that are not ripe for decision." Brief in Opposition at 3. And the United States adds that "this case represents a particularly unattractive vehicle in which to address the standing questions that petitioner raises." Brief in Op-

position at 8. Even though the court of appeals ignored this salutary advice, the respondents nonetheless urge that its decision be allowed to stand.

Petitioners believe the Eleventh Circuit's decision is precisely the sort of incautious holding, on a delicate question of justiciability, that should not have been embarked on unless it was necessary. If this Court is not prepared to address the issue itself, it should at least remove the problem by vacating the decision of the court of appeals insofar as it addressed the issue of petitioner's capacity to sue.

Respectfully submitted,

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